

STATE OF MICHIGAN
COURT OF APPEALS

DEVICA L. THOMPSON, Personal
Representative of the Estate of JOHN LEE
THOMPSON,

Plaintiff-Appellee-Cross-Appellant,

v

CARROLLTON TOWNSHIP POLICE
DEPARTMENT, JASON ARTHUR HENDRICKS,
MATTHEW TERRY LAUX, JOSHUA ROLL,
STEVE FRESORGER, SAGINAW COUNTY,
SAGINAW COUNTY SHERIFF'S
DEPARTMENT, CHARLES L. BROWN,
CARROLLTON TOWNSHIP, CRAIG OATTEN,
CITY OF ZILWAUKEE, ZILWAUKEE POLICE
DEPARTMENT, BRUCE KING, and TASER
INTERNATIONAL, INC.,

Defendants-Cross-Appellees,

and

JEFFREY BRECHELSBAUER, CARY
ONWELLER, PAUL LAGALO, RICKEY SHAFT,
STUART SCHWEIGERT, and JONATHAN
BROWN,

Defendants-Appellants-Cross-
Appellees.

DEVICA L. THOMPSON, Personal
Representative of the Estate of JOHN LEE
THOMPSON,

Plaintiff-Appellee-Cross-Appellant,

UNPUBLISHED
June 2, 2009

No. 283772
Saginaw Circuit Court
LC No. 03-050008-NO

CARROLLTON TOWNSHIP POLICE
DEPARTMENT, JEFFREY BRECHELSBAUER,
CARY ONWELLER, PAUL LAGALO, RICKEY
SHAFT, STUART SCHWEIGERT, JONATHAN
BROWN, STEVE FRESORGER, JOSHUA ROLL,
SAGINAW COUNTY, SAGINAW COUNTY
SHERIFF'S DEPARTMENT, CHARLES L.
BROWN, CARROLLTON TOWNSHIP, CRAIG
OATTEN, CITY OF ZILWAUKEE, ZILWAUKEE
POLICE DEPARTMENT, BRUCE KING, and
TASER INTERNATIONAL, INC.,

Defendants-Cross-Appellees.

and

JASON ARTHUR HENDRICKS and MATTHEW
TERRY LAUX,

Defendants-Appellants-Cross-
Appellees.

Before: Borrello, P.J., and Murphy and M. J. Kelly, JJ.

M. J. KELLY, J. (*concurring in part and dissenting in part*).

I agree with the majority's resolution of plaintiff's claims based on gross negligence, privacy, indifference to Thompson's medical needs, civil conspiracy, hiring, training and supervision, and product liability. I also agree that the trial court properly dismissed plaintiff's battery and excessive force claims to the extent that those claims were premised on the officers' conduct during the initial efforts to subdue Thompson at the apartment complex. However, when the events at the sallyport are examined as a whole, I conclude that plaintiff established a question of fact for the jury on whether the officers who participated in subduing Thompson at the sallyport used excessive force or committed a civil battery. Therefore, I respectfully dissent from the majority's resolution of these claims.

The sallyport was a secured room within a secured facility. Likewise, Thompson was handcuffed and clearly outnumbered by the officers present. Hence, the risk that Thompson might escape was negligible and the threat he posed to the officers was minimal. Further, although there is evidence suggesting that Thompson resisted the officers' efforts to move him at the sallyport, the evidence also suggests that whatever resistance Thompson offered did not pose a serious threat. Indeed, a reasonable jury viewing the video evidence could conclude that

Thompson did not offer significant resistance and that the taser's effects caused his more violent movements. Indeed, one officer opined that there was no need to use the pepper spray and that he never felt threatened at the sallyport. Under these circumstances, a reasonable jury could conclude that the officers used excessive force and that they could not have reasonably believed that the amount of force actually used was constitutionally compliant. See *Graham v Connor*, 490 US 386, 396-397; 109 S Ct 1865; 104 L Ed 2d 443 (1989); *Pearson v Callahan*, 555 US ____; 129 S Ct 808; 172 L Ed 2d 565 (2009).

Likewise, a reasonable jury could conclude that Laux's decision to deploy the taser—with the tacit approval of the other officers—was not made based on the perceived need, but rather out of desire to punish Thompson for failing to cooperate or as a means to hasten resolution of the move without having to go through the inconvenience of a more time consuming and measured response. The same could be said for the decision to use pepper spray against Thompson, which evidence indicated was done after Thompson was handcuffed, in leg irons, and physically restrained. Consequently, a reasonable jury could also conclude that those decisions were not privileged or otherwise made in good faith. *Odom v Wayne Co*, 482 Mich 459, 479-480; 760 NW2d 217 (2008); *Brewer v Perrin*, 132 Mich App 520, 528; 349 NW2d 198 (1984).

There was also evidence that established a question of fact as to whether the use of excessive force, including the use of the taser, proximately caused Thompson's death. Testimony and evidence established that Thompson had an underlying liver and heart condition that reduced his ability to process lactic acid, which made him susceptible to metabolic acidosis.¹ The evidence also established that a person's muscles will produce lactic acid during physical exertion and that this same effect occurs when a person's muscles contract while under the effects of a taser. Finally, there was evidence that Thompson died as a result of metabolic and respiratory acidosis and that the acidosis was caused by the physical strain on his body during the events at the sallyport.

Although the taser appears to have been deployed at the apartment, there is a question as to whether the taser's darts struck Thompson or that he was otherwise affected by the taser. In addition, though the accounts differed among the various witnesses, there was testimony from which a reasonable jury could conclude that Thompson's physical exertions during the struggle at the apartment were not particularly strenuous. Hence, whether Thompson was suffering from the effects of metabolic acidosis after being arrested at the apartment complex was a matter for the jury. Further, there was evidence that Thompson was repeatedly subjected to a taser at the sallyport and that the officers decision to use the taser and physical force caused Thompson's strenuous physical movements. From this evidence, a reasonable jury could conclude that the

¹ I note that Thompson's peculiar susceptibility to metabolic acidosis does not mean that his heart and liver problems caused his death. It is black letter law that a tortfeasor takes his victim as he finds him. *Richman v City of Berkley*, 84 Mich App 258, 261; 269 NW2d 555 (1978). As such, if the fatal lactic acid level in Thompson were the result of the officers' conduct, the officers would be legally responsible for Thompson's death notwithstanding the fact that the same production of lactic acid would not have been lethal in a normal person.

excessive use of force at the sallyport—and especially the use of the taser—caused the lactic acid level in Thompson to rise to the level that ultimately caused his death. Thus, a reasonable jury could conclude that the battery and excessive use of force more likely than not caused Thompson’s death.² See *Skinner v Square D Co*, 445 Mich 153, 166; 516 NW2d 475 (1994) (noting that the evidence must show a reasonable likelihood of probability rather than a mere possibility, but that it need not negate all other possible causes).

I conclude that there were questions of fact precluding summary disposition of plaintiff’s battery and excessive force claims against all the officers involved in the effort to subdue Thompson at the sallyport. For these reasons, I would affirm in part, reverse in part, and remand for further proceedings on these claims.

/s/ Michael J. Kelly

² While I agree that plaintiff needed to present some evidence to quantify the lactic acid caused by the taser in order to survive summary disposition of the products liability claim, the same is not true for the battery and excessive force claims. Plaintiff only needed to show that, as a whole, the conduct that amounted to a battery and the use of excessive force more likely than not resulted in Thompson’s death.